Hastings Law Journal

Volume 51 | Issue 6 Article 6

1-2000

The Overlooked Concern with the Uniform Computer Information Transactions Act

Katy Hull

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

 Part of the Law Commons

Recommended Citation

Katy Hull, *The Overlooked Concern with the Uniform Computer Information Transactions Act*, 51 HASTINGS L.J. 1391 (2000).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol51/iss6/6

This Note is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

The Overlooked Concern with the Uniform Computer Information Transactions Act

by
KATY HULL*

Legislators, commentators, law professors, and organizations such as the American Law Institute and the National Conference of Commissioners on Uniform State Laws propose laws with a view to improving society. However, in the case of the Uniform Computer Information Transactions Act ("UCITA"),[1] those crafting the legislation, though well-intentioned, may be leading states down the wrong path. This possibility has not escaped the attention of commentators, who express concern that the UCITA's treatment of software licenses will remove consumer protections that purchasers currently enjoy under the U.C.C. Article 2. However, as this Note concludes, the real area of concern has often been overlooked. Persons proposing new software licensing laws must carefully consider how quickly computer technology changes. The UCITA or any equivalent legislation must walk a fine line to provide sufficient guidance and assurance for contracting parties yet not create overly restrictive laws that will strangle online commerce in its infancy. Simply put, state legislatures should not adopt well-intentioned but misguided software licensing laws.

This Note will argue that technology will outgrow any laws based

* J.D., University of California, Hastings College of the Law, 2000; B.A., University of Oregon, 1993.

1. Prior drafts of the UCITA were proposed as Article 2B of the Uniform Commercial Code [hereinafter U.C.C.]. In April 1999, the National Conference of Commissioners on Uniform State Laws [hereinafter NCCUSL] opted to promulgate a code for computer information transactions as a stand alone uniform act rather than as a part of the U.C.C. Many of the criticisms included in this Note were made with respect to earlier drafts of Article 2B, but these criticisms remain relevant to the UCITA. Reference to the "proposed U.C.C. 2B," will be made when more appropriate to the original commentator's context.

on specific concepts such as "mouse-clicks" and "e-mail," leaving us in exactly the bind we are in now. Given the speed at which technology is changing, case law and precedent will serve as better guides to developing rules in this area. Legislators, judges, and lawyers should find their own way through the issues, educating one another and listening carefully to technology practitioners. There will be a learning curve for all involved, as with any new body of law, but eventually steps will be taken with increasing confidence. If legislatures decide that new regulations, rather than reliance on precedent, are needed, then the focus should be on the existence of a contract, the understandings of the parties involved, and contractual terms and conditions.

Part I of this Note will define relevant terminology and provide a general background to the contractual issues underlying software licensing. Part II will review the existing case law that addresses software licensing issues. Part III will discuss arguments made in favor the UCITA or any equivalent uniform law governing software licensing. Part IV will examine criticisms of the UCITA by two commentators and explain why these criticisms are invalid and indeed overlook the true cause for concern with the UCITA.

I. What is a "Clickwrap"?

"Clickwrap" refers to a particular form of license agreement in which a window on a computer screen presents the computer user (and potential licensee) with the terms to the agreement as well as two buttons, reading (generally) "I accept" and "cancel" or "I do not accept."[2] If the user clicks the mouse indicator on the button that reads "cancel," the transaction stops and the display returns to the original window.[3] If the user clicks "I accept," then the software download or installation begins.[4] This format allows for various ways of ordering the information. For example, the licensor may require a user to click on the "I accept" button for each "page" of the agreement to ensure some interaction between the licensee and the license terms.[5] At the other extreme, the user may be referred (by

2. Zachary M. Harrison, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907, 907-08 (1998). Mr. Harrison's Note examines the September 1997 draft of the proposed U.C.C. 2B.

3. W. Scott Petty, *E-Commerce Using Enforceable Click-Wrap Agreements*, INTELL. PROP. TODAY, Sept. 1998, at 22.

4. *See id.*

5. Fred M. Greguras, *Click Commerce: Vendors of Software Over the Internet Must*

means of a link) to a new page containing the terms but which need not necessarily be viewed or read before the "I accept" button is pressed.[6]

The term "clickwrap" comes from the format's similarity to an earlier type of software license called a "shrinkwrap." A shrinkwrap license is presented to the purchaser as part of the packaging of purchased software. Under this theory, the purchaser "agrees" to the license agreement merely by breaking the seal of the packaging, or in other words, opening the software.[7]

Both shrinkwrap and clickwrap licenses are contracts, or at least are attempts at creating contracts, between the licensee and licensor. They contain the classic requisite elements of a contract: the exchange of promises (in the Restatement vocabulary)[8] or offer and acceptance (as expressed in traditional common law), and consideration.[9] One might also consider the exchange of a package of software for money to be a sale of goods, falling under the Uniform Commercial Code.[10] Indeed, an individual who goes to a store, picks up a box containing software on compact disks or floppy disks, and pays for it at the cash register probably does not consider the transaction to be much different than buying a bag of sugar.

However, the purchaser of a bag of sugar owns it outright and may use it to bake cookies to be re-sold at a school benefit, lend a cup to a neighbor to be returned in kind later, or distribute it for free to a church group. On the other hand, by the terms of the software contract itself, the purchase of the disk package is, in reality, a purchase of *the license to use* the software. The purchaser does not necessarily receive all of the property rights that she might expect. Typical restrictions on the licensee's rights include a prohibition on copying or disclosure without the permission of the licensor and limitations on various warranties such as merchantability or fitness for a particular purpose.[11] Additionally, licensors are generally attempting to avoid the doctrine of first sale, which, under intellectual

Heed Intellectual Property Rules, SAN FRANCISCO DAILY J., Sept. 19, 1998, at 5.

6. Gary H. Moore & J. David Hadden, *On-Line Software Distribution: New Life For 'Shrinkwrap' Licenses?*, COMPUTER LAW., Apr. 1996, at 3.

7. Carey R. Ramos & Joseph P. Verdon, *Shrinkwrap and Click-On Licenses After ProCD v. Zeidenberg*, 13 COMPUTER LAW., Sept. 1996, at 1-2.

8. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

9. E. ALLAN FARNSWORTH, CONTRACTS §§ 3.1-.3 (1982).

10. U.C.C. § 2-102 (1990).

11. *See* Harrison, *supra* note 2, at 909-10. For a specific example of a software license agreement, see *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 257 n.2 (5th Cir. 1988).

property law,[12] would allow the purchaser of software to reverse engineer the software and adapt it as she sees fit, and to install the software on many different computer systems.[13]

Most purchasers are unlikely to appreciate the subtle legal differences between a license and an outright sale. But the rights of the purchaser of software will depend heavily on whether the contract is a license or a purchase of goods. Any confusion and misunderstanding may also be compounded by the timing of the offer and acceptance, which is far less straightforward when one contracts electronically for a software license.

II. Case Law on Clickwrap and Shrinkwrap Licenses

Courts have had some difficulty in assessing these clickwrap and shrinkwrap contracts, and there is little case law thus far addressing the issue. What case law does exist is mostly indirect and somewhat inconsistent. Twelve years ago, in *Vault Corp. v. Quaid Software Ltd.*,[14] the Fifth Circuit held a shrinkwrap license to be unenforceable under contract law. Vault manufactured computer disks containing software designed to prevent the unauthorized duplication of any other software added to the disk at a later time (e.g. by a software manufacturer).[15] Vault's software prevented a computer from opening the other program without having the disk in the drive, so that the program could not be used if it were copied from Vault's disk to another disk, or to the hard drive.[16] Vault included a license agreement with each package of its disks which "specifically prohibit[ed] the copying, modification, translation, decompilation or disassembly of Vault's program."[17] The defendant, Quaid Software, was accused of breaching that license agreement by reverse engineering Vault's protective software program in order to build a software "key" which would allow the duplication of programs on Vault's disks.[18] The court of appeals affirmed the district court's

12. There are interesting intellectual property issues with these software license transactions as well, particularly the question of preemption by Federal copyright law. These considerations are numerous and are beyond the scope of this Note. For an excellent short discussion, see *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 96 n.7 (3d Cir. 1991).

13. Moore & Hadden, *supra* note 6, at 1.

14. 847 F.2d at 270.

15. *See id.* at 256-57.

16. *See id.*

17. *Id.* at 257.

18. *See id.* at 257-58.

finding that the license was unenforceable because it was a contract of adhesion.[19]

Neither the Fifth Circuit nor the district court articulated its reasoning for finding a contract of adhesion.[20] However, arguments that both shrinkwrap and clickwrap licenses are adhesion contracts can be found in the scholarship of Farnsworth. Farnsworth identified two dangers implicit in enforcement of standardized forms (including mass-marketed license agreements) that relate to these transactions.[21] The first problem occurs when the offeror of the terms has "the advantage of time and expert advice in preparing [the contract]" as compared to the offeree who "may have no real opportunity to read the form and it is often not expected that he will do so."[22] The second problem arises when there is a great disparity in bargaining power between the parties, "or, as is more often the case, there may be no opportunity to bargain at all."[23] The shrinkwrap and clickwrap licenses fall perfectly under one of Farnsworth's examples, that of the "take-it-or-leave-it proposition."[24] However, Farnsworth notes that:

> courts steeped in traditional contract doctrine have not been receptive to parties who sought to be relieved of their agreements on the grounds of such imposition. Since the requirement of bargain . . . is plainly met by simple adherence to a standard form, the doctrine of consideration offers no ground for such relief. And since the objective theory of contracts imposes no requirement that a party intend or even understand the legal consequences of his actions, a party is not entitled to relief merely because he neither read the standard form nor considered the legal consequence of adhering to it.[25]

In *ProCD Inc. v. Zeidenberg*,[26] the Seventh Circuit directly upheld the enforceability of shrinkwrap licenses and indirectly indicated that clickwrap licenses are enforceable as well. In that case, the court discussed a licensee's options if the contract terms of a shrinkwrap license were unacceptable.[27] Defendant Zeidenberg purchased a software database of telephone listings, but broke the

19. *See id.* at 269-70.

20. It is disappointing that these courts did not articulate their reasoning because courts generally try to avoid that particular result. *See* FARNSWORTH, *supra* note 9, § 4.26.

21. *See id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* (citations omitted).

26. 86 F.3d 1447, 1449 (7th Cir. 1996).

27. *See id.* at 1450-53.

terms of the license agreement by making the database information available to the public over the Internet at a lower price than the plaintiff was charging.[28] Zeidenberg argued that he could not, by law, have agreed to all the contract terms.[29] The outer packaging displayed only part of the contract, and at the time that he purchased the software he had not seen, much less agreed to, the additional terms which appeared on his computer screen once he began to install the software for use.[30] The district court held that the additional terms were unenforceable as a matter of law because Zeidenberg never assented to them.[31] The court of appeals, however, determined that the additional terms were enforceable because Zeidenberg had the opportunity to return the software to the store and get his money back if the additional terms were unacceptable and did not choose to do so.[32] This holding is in line with traditional contract law, which considers acceptance to occur when a buyer does not "make an effective rejection" after having "a reasonable opportunity to inspect" the goods.[33]

The appellate court's rationale behind its holding in *ProCD* suggests that clickwrap licenses are even more likely to be upheld by courts than shrinkwrap licenses. The court noted that the defendant had read the license since, in fact, "[h]e had no choice, . . . the software splashed the license on the screen and would not let him proceed without indicating acceptance."[34] Similarly, the format of clickwrap licenses avoids the issue that arose in *ProCD*: terms added after the actual purchase. The purchase literally cannot be completed until after the terms (or access to them through a link to another page) have been presented to the purchaser.

A more recent case, *Hotmail Corp. v. Van $ Money Pie Inc.*,[35] further supports the proposition that courts are more likely to uphold clickwrap licenses than shrinkwrap licenses. In *Hotmail*, the court considered a clickwrap license[36] that outlined the terms of service under which a licensee could use the Hotmail e-mail service.[37] The

28. *See id.* at 1450.
29. *See id.* at 1452.
30. *See id.*
31. *See* ProCD Inc. v. Zeidenberg, 908 F. Supp. 640, 655 (W.D. Wis. 1996).
32. *See ProCD Inc.*, 86 F.3d at 1452-53.
33. U.C.C. § 2-606(1)(b) (2000).
34. *ProCD Inc.*, 86 F.3d at 1452.
35. No. C 98-20064, 1998 U.S. Dist. LEXIS 10729, at *16 (N.D. Cal. Apr. 16, 1998).
36. A copy of Hotmail's agreement is available in paper format from the author.
37. 1998 U.S. Dist. LEXIS 10729, at *16-17.

defendant had signed up online for several e-mail accounts with Hotmail and, in creating each account, had been required to agree to the terms outlined in Hotmail's service agreement.[38] The terms to which the defendant agreed prohibited sending unsolicited commercial e-mails, or "spam," from the Hotmail service.[39] The court found that the evidence supported Hotmail's claim that the defendant was "using Hotmail's services to facilitate sending spam and/or pornography."[40] It concluded that Hotmail would "likely prevail on its breach of contract claim" against Van Money,[41] suggesting that clickwrap licenses are valid contracts, even if it did not discuss the presentation or format of the specific license terms.

On the Hotmail account creation page existing as of this writing, one "accept" button is presented above the terms of service agreement, so that a licensee could accept the terms without scrolling through them, and another such button is at the bottom of the page.[42] As the courts become more accustomed to the technology involved, they may very well begin to consider such issues as the particular placement of the "accept" buttons. The common law of contracts provides that a party will not be held to a term that is "not one that an uninitiated reader ought reasonably to have understood to be a part of that offer."[43] This idea was incorporated into the U.C.C., which requires that any exclusion or modification of warranties must be "conspicuous."[44] Since these clickwrap and shrinkwrap licenses generally contain limitations of liability and warranty disclaimers, it is no great stretch to require these disclaimers to be "conspicuous."[45] The techniques mentioned above, of creating a link to warranty modifications on a separate page instead of on the same page as the "accept" button, or even the placement of the button above the terms so that the licensee is not required to scroll past the terms, are of dubious validity under this view. Terms limiting liability or disclaiming warranties on a separate page, apart from the acceptance feature, are arguably not conspicuous.

Similarly, one might argue that, because of the requirement of conspicuousness and the unenforceability of hidden terms,

38. *See id.*
39. *See id.*
40. *Id.*
41. *See id.*
42. *See supra*, note 36.
43. FARNSWORTH, *supra* note 9, § 4.26.
44. U.C.C. § 2-316(2) (2000).
45. *See* ProCD Inc. v. Zeidenberg, 908 F. Supp. 640, 654 (W.D. Wis. 1996).

shrinkwrap licenses should in fact be unenforceable. The problem with shrinkwrap licenses is that the license terms (as discussed in section I) are "accepted" by the licensee's action of opening the packaging. The acceptance of these terms comes after the contract has already been formed, that is to say after the purchase of the software. The Third Circuit found this to be the case in *Step-Saver Data Sys., Inc. v. Wyse Tech.*[46]

In *Step-Saver*, the plaintiff Step-Saver was in the business of assembling hardware and software packages for the specific needs of a group of users, particularly offices of doctors and lawyers.[47] The plaintiff had purchased software from The Software Link, Inc. ("TSL"), the co-defendant, to use as the operating system for these packages.[48] When the plaintiff's customers began complaining of problems with the software, and the problems could not be resolved, the plaintiff filed suit.[49] TSL claimed that its shrinkwrap licenses contained a disclaimer of warranties clause that applied against the plaintiff, and the district court agreed.[50]

The court of appeals disagreed, noting that Step-Saver had "never expressly agreed to the terms of the ... license, either as a final expression of, or a modification to, the parties's [sic] agreement."[51] The court found that the contract formed by the parties in their telephone discussions and subsequent actions "was sufficiently definite without the terms provided by the [shrinkwrap] license."[52] The court noted in particular that the parties had previously agreed to the specific goods involved, the quantity, and the price of the goods.[53] The court concluded that "adding the disclaimer of warranty and limitation of remedies provisions from the [shrinkwrap] license would ... substantially alter the distribution of risk," and therefore would be material, so the "terms did not become a part of the parties's [sic] agreement."[54] The court's basis for these findings was U.C.C. section 2-207, which addresses additional terms added to a contract by an acceptance or confirmation.[55] The court's

46. 939 F.2d 91 (3d Cir. 1991).
47. *See id.* at 93.
48. *See id.* at 94.
49. *See id.*
50. *See id.* at 94-95.
51. *Id.* at 98.
52. *Id.* at 100.
53. *See id.*
54. *Id.* at 105.
55. *See* U.C.C. § 2-207 (2000).

use of this provision, however, presumes that the U.C.C. applied at all, which is not a foregone conclusion. The U.C.C. explicitly defines its scope as applying to transactions in goods.[56] The language of the U.C.C. also suggests that it applies to the *sale of goods*, rather than licenses or other non-proprietary transactions.[57] The U.C.C. states clearly that "[a] 'sale' consists in the passing of title from the seller to the buyer for a price."[58] As explored above, the licensing of software specifically and particularly *avoids* passing title to the purchaser. Nevertheless, the courts have usually treated software licenses "as a sale of goods governed by Article 2 of the Uniform Commercial Code."[59] One reporter, in explaining the problem, noted that "the odd thing about Article 2... is that it has become the dumping ground for software even though software is not a good and is more often licensed than sold."[60]

III. The Argument for the UCITA or Some Equivalent

The software industry in the United States is growing rapidly and has become a significant percentage of the economy. "[T]echnology's share of the U.S. gross domestic product is growing, jumping from 6.4% in '93 to 8.2% in '98, says the Department of Commerce."[61] Online sales of software alone measure in the billions.[62] Online sales of all types of goods are also rising dramatically. One analyst noted that the 1997 figure of $3 billion in total online sales was expected to increase to $7.1 billion in 1998.[63] Another estimate claimed that e-

56. *See id.* § 2-102.

57. *See id.* § 2-106. *See generally id.* §§ 2-103, 2-106 (2000) (discussing "contract for sale," "present sale," "sale," and "seller").

58. *Id.* §§ 2-106, 2-401.

59. Moore & Hadden, *supra* note 6, at 2 (citing Advent Sys., Ltd. v. Unisys Corp., 925 F.2d 670 (3d Cir. 1991); Arizona Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759 (D. Ariz. 1993)). *See generally* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91 (3d Cir. 1991) (agreeing that the U.C.C. is applicable to software transactions).

60. Holly K. Towle, *Mapping the Law for E-Commerce Explosion; Revision of UCC Article 2B Seeks to Blend Common Laws, Uncommon Applications*, SAN FRANCISCO DAILY J. SUPPLEMENT, Sept. 29, 1998, at 8.

61. Pete Barlas, *Internet Is Weaving Its Way Throughout Society's Fabric*, INVESTOR'S BUS. DAILY, Jan. 19, 1999, at A8.

62. Sales of pricier business software were valued at $2.3 billion in 1997, and game software was worth a total of $1.3 billion. *See Industry Snap Shot*, INVESTOR'S BUS. DAILY, Dec. 28, 1998, at B7. In 1998, software retailers' sales (including mail-orders) jumped to $5.6 billion. *See* Paula Rooney, *Software Sales Stay the Course, Despite Industry Trends*, COMPUTER RETAIL WK., Jan. 4, 1999.

63. Matthew Nelson, *'Tis the Season for I-Commerce; Retailers Predict Big Boom in Online Holiday Sales This Year*, INFOWORLD, Nov. 30, 1998, at 14.

commerce reached $6.6-7.2 billion in the last quarter alone of 1999.[64] Online sales of software are expected to follow the trend. One survey by the Software Publishers Association shows that "more than 18% of software publishers sell and distribute full versions of their software over the Web."[65] Another research group "projected that 84% of software publishers expect electronic software distribution to account for about 50% of their sales by 2001."[66] The number of people using the Web in the U.S. in 1998 was over 56 million,[67] and one can only expect that number to grow.

As discussed in section II above, the courts are somewhat inconsistent in handling the contract implications involved in these hundreds of thousands of transactions. Arguably, a stable law of contract is necessary to develop the industry to its fullest potential. In addition, contract law, as explained by Farnsworth, benefits society as a whole as well as the particular sellers and buyers involved:

> From the perspective of society as a whole, the function of the law of contracts might have been seen as furthering the general economic good by encouraging parties to enter into such productive transactions. From the perspective of the parties themselves, the function might have been viewed more narrowly as aiding them in planning for the future by protecting their expectations. From either perspective, it was essential to provide a general basis for the enforcement of promises that included *purely executory* exchanges of promises. The development of such a general basis closely paralleled the specialization of labor and the development of competitive markets.[68]

A settled, nation-wide set of laws governing software licenses would help provide a solution to another issue—that of jurisdiction over transactions where neither party may know where the other is located. Clearly, some sort of predictable, reasonably consistent laws across the country would encourage the growth of electronic commerce. This is discussed briefly (in the context of third-party verification of identity) by A. Michael Froomkin, who notes that a licensor will need to know where the licensee lives because this "may affect what law applies" to the transaction.[69] The reverse would also

64. *See Retailers Assess Performance After Intense Fourth Quarter*, ELECTRONIC COM. NEWS, Jan. 17, 2000.

65. David Orenstein, *Online Licenses Lack Standards and User Interest, Developers Team Up to Configure System*, COMPUTERWORLD, Aug. 3, 1998, at 8.

66. *Id.*

67. Barlas, *supra* note 61, at A8.

68. FARNSWORTH, *supra* note 9, § 1.3.

69. A. Michael Froomkin, *Article 2B as Legal Software for Electronic Contracting-*

be true, as the licensee may also be concerned about what state's contract law would be used in the event of a dispute. A set of suggested standards would, if adopted by a majority of states, help alleviate this concern. A broadly adopted set of laws would give parties to a transaction more confidence in knowing what would be the likely expectations of courts in other states, even if they do not necessarily know the state residence of the other party to the transaction. One federal court concluded that "applying a uniform body of law on the wide range of commercial questions likely to arise in software disputes would offer substantial benefits to parties, particularly given the importance of software in commerce and the advantages of uniformity."[70]

Thus, the argument for a uniform body of law addressing the enforcement of clickwrap licenses is based on three factors: the importance of the software license industry to the U.S. economy, the need for stability to insure the continued growth of this industry, and the inconsistent application of the existing body of contract law by the courts. The American Law Institute responded to this vacuum with the proposed U.C.C. Article 2B, an amendment to the Uniform Commercial Code. Ultimately, however, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") officially promulgated the proposed law, calling it the UCITA.[71] The NCCUSL decided to present its model legislation as an act that would be separate and distinct from the Uniform Commercial Code.[72] A reporter's note in the original Article 2B gives a sense of the intended scope of the UCITA, which includes

> transactions involving creation or distribution of computer software, multimedia or interactive products, computer data, Internet, and online distribution of information. This leaves unaffected the many transactions in the core businesses of other information industries (e.g. print, motion picture, broadcast, sound recordings) whose business practices in their core businesses differ from those of the computer software, online, and data industries. This article does not apply to print books, newspapers, or

Operating System or Trojan Horse?, 13 BERKELEY TECH. L.J. 1023, 1038 (1998).

70. Towle, *supra* note 60, at 8 (citing Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 676 (3d Cir. 1991)).

71. *See* George L. Graff, *The Evolution of the Uniform Computer Information Transactions Act*, SOFTWARE L. BULL., Nov. 1999, at 216.

72. *See* NCCUSL Press Release, *NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act* (visited Sept. 15, 2000) <http://www.nccusl.org/pressrel/pr4-7-99.html>.

magazines.[73]

IV. Problems with the UCITA and Possible Solutions

A. Warranty Coverage Problems

The UCITA has been subject to criticism that it will constrict consumers' rights. One commentator, Michele Kane, has taken issue with the UCITA's definition of a "computer program," complaining that it "creates distinctions ... in a manner contrary to common understanding and commercial practice, making the simple complex and the statute difficult to discern and apply."[74] The definition distinguishes between the two functions of a computer program, the operating instructions for the computer itself, called "computer program," and the information which is communicated to a human reader, which is called "informational content."[75] The distinction is important because the informational content, as defined by the UCITA, is not covered by implied warranties.[76] The potential harm is that the consumers and attorneys "may be unable to determine the extent to which warranties apply."[77] Additionally, Kane warns, the definitional problems will "affect the availability of, and limitations on, remedies"[78] because a purchaser is not entitled to consequential damages stemming from losses caused by the informational content.[79] Kane offers no specific suggestions for improvements to the proposed amendment.

However, the UCITA does contain consumer protection clauses. For example, in discussing its scope, the UCITA provides that "if this [Act] or a term of a contract under this [Act] conflicts with a consumer protection statute [or administrative rule], the consumer

73. U.C.C. § 2B-103 Reporter's Note 2 (Proposed Draft Dec. 1998) (noting that earlier drafts had included these "other information industries," and those differing interests nearly stopped the entire 2B project. The project had to be narrowed to apply only to software and information contracts.). *See also* Brenda Sandburg, *Commercial Code Upgrade May Fall Apart*, THE RECORDER, Sept. 28, 1998, at 1.

74. Michele C. Kane, *When Is a Computer Program Not a Computer Program? The Perplexing World Created by Proposed U.C.C. Article 2B*, 13 BERKELEY TECH. L.J. 1013, 1013 (1998).

75. *See* UNIF. COMPUTER INFO. TRANSACTIONS ACT § 102(a)(12), (a)(37) (2000) (defining, respectively, "computer program" and "informational content").

76. *See* Kane, *supra* note 74, at 1017-18.

77. *Id.* at 1017.

78. *Id.* at 1020.

79. *See id.*

protection statute [or rule] governs."[80] The official comment to this section further explains that "the Act does not alter state consumer protection statutes" and notes that in fact "the Act does contain numerous consumer protections."[81]

Furthermore, the warranty disclaimer requirements of the UCITA are comparable to those in U.C.C. Article 2, sometimes explicitly so. For example, language which is sufficient to disclaim or modify warranties of merchantability or fitness for a particular purpose under Article 2 will also be sufficient under the UCITA.[82] In the case of mass-market transactions (involving, for example, clickwrap or shrinkwrap licenses), the UCITA requires any modification or disclaimer of an implied warranty to be conspicuous,[83] which assures "that the party against which the disclaimer operates has fair notice of its terms."[84] The terms of the UCITA were deliberately kept as close to Article 2 as possible, in order to "avoid requiring parties to make a priori decisions about Article 2B or Article 2... coverage particularly when 'mixed' transactions will be increasingly common."[85] In other words, software is frequently sold with hardware, which is covered by Article 2. The writers of UCITA are trying to avoid the confusion that would result from different standards covering different pieces of the same transaction. Therefore, they designed the UCITA to work in harmony with Article 2 in order to avoid differing standards between the two for warranty terms and consumer protections.

B. Acceptance Problems

Another commentator, Zachary Harrison, identifies four distinct problems with clickwrap licenses which are not addressed by the UCITA: mistake and lack of psychological commitment by the purchaser, unclear timing of manifestations of assent, potential lack of legal capacity of the purchaser, and state statutes requiring signatures on certain transactions.[86]

(1) Lack of Genuine Commitment

The first problem, mistake or lack of psychological commitment,

80. § 105(c).
81. *Id.* § 105 cmt. 5.
82. *See id.* § 406(b)(4).
83. *See id.* § 406(b)(1)(A), (b)(2), (b)(3).
84. *Id.* § 406 cmt. 4.
85. U.C.C. § 2B-406 Reporter's Note 4(f) (Proposed Draft Dec. 1998).
86. Harrison, *supra* note 2, at 939-42.

refers to the possibility of an individual clicking on an "I accept" button to accept the terms of an agreement without realizing what they have done, or without considering the ramifications.[87] The problem arises from the ease with which a transaction can be completed — one click of a button, literally, with no requirement that the terms actually be read.[88] The technology itself, claims the author, is the problem, because "the consumer's lack of subjective intent to agree to the license agreement is hidden behind her computer interface."[89]

The UCITA addresses this possibility of mistake or lack or intent. Section 112 outlines the requirements for a manifestation of assent, emphasizing the importance of knowing assent to a term.[90] The official draft comment to the section gives a specific three-step analysis to determine assent. The purchaser must have had knowledge of the agreement term or an opportunity to review it,[91] and must sign the contract (or in the language of the UCITA, "authenticate," giving the digital equivalent of a signature) "with reason to know that the conduct indicates assent,"[92] and the signature or authentication must be attributable to the purchaser.[93] These requirements negate the possibility of a mistaken assent to a contract, or at the very least provide the unwitting purchaser with a strong defense to contract claims.

(2) Timing of Assent

The second problem identified by Harrison is the issue of the timing of the purchaser's assent to the contract terms. Harrison concedes that "[w]ith respect to a license provided after acceptance, section 2B-213 [and now, the UCITA] does provide for a refund if the license is refused."[94] The problem Harrison is concerned with is apparently the feasibility of returning the software. He points out that "the essential question is whether consumers are truly able to withdraw their consent to objectionable click-wrap terms based on the current prevailing practices of Internet service providers."[95] The

87. *See id.* at 939-40.
88. *See id.*
89. *Id.* at 940.
90. *See* UNIF. COMPUTER INFO. TRANSACTIONS ACT § 112 (2000).
91. *See id.* cmt. 2.
92. *Id.*
93. *See id.*
94. Harrison, *supra* note 2, at 940.
95. *Id.* at 940-41.

obstacle to returning the software is the combination of billing practices of some Internet service providers, who will only allow a contract to be terminated at the end of a monthly billing cycle, and the fact that many service providers do not have sufficient customer assistance, so that a consumer's credit card is billed for the time spent waiting on the phone for a response.[96]

This concern, however, is only valid for contracts with a monthly payment requirement, rather than for a one-time money-for-software exchange. Also, neither part of this concern is really a problem with the UCITA, but instead a problem with either the equipment (limited phone lines) or the practices and policies (billing practices, insufficient customer service employees, etc.) of a particular business. Consumers will, over time, likely move away from providers whose business practices displease them, or in some cases they will bring lawsuits to attempt to force the providers to solve the equipment and business practices problems. For example, America Online, an Internet Service Provider, was the defendant in at least two class-action lawsuits in which its customers complained of their lack of access to the networks caused by a change in the billing practices.[97] Neither suit involved UCITA issues, and the UCITA cannot be expected to solve problems resulting from an Internet service provider's equipment.

(3) Lack of Capacity to Assent

The third problem Harrison addressed is the potential acceptance of a license contract by a party lacking legal capacity, such as a child or person who is otherwise incompetent.[98] This problem is in some ways similar to his first concern about mistake, in that the technology contributes to the problem. Since the parties have no face-to-face dealings, and the purchaser merely clicks a button to indicate acceptance of the contract terms, the licensor is unable to know if the licensee is a child. This concern also raises a consumer protection issue: may the unknowing parent of an Internet-savvy child be held liable for the child's online contracts.[99] Writing about an earlier draft of U.C.C. Article 2B, Harrison insists that "[b]ased on children's tremendous access [to the] Internet, the U.C.C. drafting

96. *See id.*

97. *See* Crosby v. America Online, 967 F. Supp. 257, 265 (N.D. Ohio 1997); America Online v. Williams, 958 S.W. 2d 268 (Tex. Ct. App. 1997).

98. *See* Harrison, *supra* note 2, at 941.

99. *See id.*

committee must address this problem in future drafts."[100] Still, even in contracts involving traditional goods that fall within the scope of the U.C.C., the common law is the source of the solution to the disaffirmance of a contract by a minor, rather than the U.C.C.

The common law provides that minors' contracts are "voidable" at the election of the minor.[101] Farnsworth further explains that "[t]he power of avoidance is personal to the minor and can be exercised only by the minor himself or . . . in some instances [by] his parent or other guardian."[102] If the minor does choose to disaffirm the contract, she will be required to return the remaining portion of the goods she received.[103] In the context of a software license, a minor may accomplish essentially the same result by deleting the software from a computer such that it may no longer be used. The same common-law consumer protections would apply to software as to other more tangible goods.

Even if software vendors were to begin requiring purchasers to click a button reading "I accept, and declare that I am over the age of 18 and competent to enter into a contract," consumer protections would still be in place. For instance, some states refuse to permit a minor who has misrepresented her age to disaffirm a contract.[104] However, even the states that embrace this exception to the general rule do not apply it to instances of "a printed affirmation of majority on a standard form supplied by the other party."[105] So the act of the minor clicking a button which asserts competency to enter into a contract will not remove the consumer protections which allow the minor to disaffirm.

(4) Conflicts in Proof of Assent

The last problem examined by Harrison is the possible conflict between state statutes which require signatures on certain types of contracts, and the UCITA's concept of "authentication," which is a much broader method of indicating an intent to be bound by the terms of a contract. The UCITA says that "[a] person manifests assent to a record or term if the person . . . authenticates the record or

100. *Id.*
101. FARNSWORTH, *supra* note 9, § 4.4.
102. *Id.*
103. *See id.* § 4.5.
104. *See id.* These states view the minor's conduct as a tort since it induces reliance and may cause the seller to sustain a loss. *See id.*
105. *Id.*

term."[106] According to the UCITA, "to authenticate" is "to sign or, with the intent to sign a record, otherwise to execute or adopt an electronic symbol, sound, message, or process referring to, attached to, included in, or logically associated or linked with, that record.[107]

Clearly the UCITA covers a wide range of possible modes of assent and thus sets the stage for possible conflicts with state laws regarding signatures. However, as Harrison concedes,[108] and as is noted above, another section of the UCITA cedes priority to state consumer protection laws if there is a conflict.[109] So at least in regard to consumer protections, no real issue exists here.

C. Some Proposed Solutions

Harrison has proposed solutions to some of the issues presented. To avoid the problem of a lack of actual commitment on the part of the licensee/purchaser, Harrison essentially wants a higher degree of interaction between the licensee and the technological acceptance of the terms.[110] The suggested means for this are:

> to require the consumer to type in an affirmative statement, such as "I assent to the terms of the license agreement," in order to signify binding assent .... Another possibility would be for the click-wrap page to have a clause that says "in order to signify that you agree to be bound by the foregoing terms, please type in the following code" .... [T]hose positive acts would be a much clearer form of acceptance than the buyer refraining from returning the software as suggested by the Seventh Circuit in *ProCD, Inc. v. Zeidenberg.* [111]

Harrison also suggests that the UCITA "should encourage clickwrap licensors to take steps to make it technologically impossible for a user to access the material offered by a site unless the consumer has indicated assent to the license before the software is downloaded."[112] Such steps would solve the potential concern of a licensor/seller that a consumer will buy the software, copy it to a computer, discover a license term to which she does not agree, and return a copy of the software to the seller without removing the

106. UNIF. COMPUTER INFO. TRANSACTIONS ACT § 112(a)(1) (2000).
107. *Id.* § 102(a)(6).
108. *See* Harrison, *supra* note 2, at 942.
109. *See* § 105(c), (d) (2000). *Cf.* § 105(b) (giving courts explicit permission to override the UCITA in favor of conflicting public policy).
110. *See* Harrison, *supra* note 2, at 942-44.
111. *Id.* at 944.
112. *Id.* at 944-45.

software from her own computer—or perhaps return the copy and yet keep the software regardless of her acceptance of the license terms.[113]

The primary problem with the proposed solutions is that they may aggravate rather than cure the difficulties in the law that led to the need for the UCITA in the first place. The ultimate rationale for the adoption of the UCITA is that the technology evolved faster than the law, and this led to uncertainty about what laws covered transactions involving the new technologies.[114] As attorney Carol Kunze explained the problem in her online commentary,

> [t]he U.S. economy has changed dramatically since the 1950's when ... the Uniform Commercial Code was initially adopted. As befitted a goods-based economy, the UCC focused on the *sale* of *tangible* goods. Since that time we have shifted from a goods to a service-based economy.... The UCC does not address the licensing of intangible goods—the most prevalent form of commercial software transaction today. Nor does it apply to service contracts such as software development, maintenance, and access contracts.[115]

Another commentator who is quite well-known among the online community, John Perry Barlow, dramatically announced that "[n]otions of property, value, ownership, and the nature of wealth itself are changing more fundamentally than at any time since the Sumerians first poked cuneiform into wet clay and called it stored grain."[116] Harrison's suggested solutions include specific requirements such as technology to force a higher degree of interaction between the licensee and the contract terms and technology which forced the licensee to view all the terms before assent could take place.[117] However, any law which binds itself to concepts so tightly intertwined with existing technology will become outdated and will end up constricting growth within a very short time span, just as the current technology industry has outgrown the law of the original Uniform Commercial Code. Furthermore, as indicated

113. *See id.* at 945.

114. *See supra* text accompanying notes 55-60. *See also* Carol Kunze, *The 2BGuide* (visited Sept. 15, 2000) <http://www.2Bguide.com/bkgd.html> [hereinafter Kunze, *2BGuide*]; Carol Kunze, *UCITA Online* (visited Oct. 19, 2000) <http://www.ucitaonline.com>.

115. Kunze, *2BGuide*, *supra* note 114.

116. John Perry Barlow, *The Economy of Ideas: Everything You Know about Intellectual Property Is Wrong*, *in* INTELLECTUAL PROPERTY: MORAL, LEGAL, AND INTERNATIONAL DILEMMAS 349, 353 (Adam D. Moore ed., 1997).

117. *See supra* text accompanying notes 110-112.

above,[118] the problems with consumer protections discussed by various commentators are sufficiently addressed by the UCITA and the common law of contracts. Efforts should now be focused on creating a law which will not be outgrown anytime soon in the face of explosively evolving technology and business models.

This obviously will not be an easy task. Professor A. Michael Froomkin has explained that "[o]ne reason why Article 2B [and the UCITA have] proven to be so difficult to get right is that the information technologies to which it would apply are themselves in a state of ferment."[119] Froomkin goes even further, suggesting that "adding in the task of defining distinct rules applicable to all electronic contracts of sale, or even just those... licensing information, may make it impossible"[120] to write a truly effective UCITA.

D. The Real Problem with the UCITA

In all, the UCITA debate is remarkably thoughtful, and yet, as in most discussions about information policy, participants generally employ language about "information," the "network," and a "digital economy" as though these terms refer to something already well understood. On the contrary, network technology is still evolving rapidly, commercial software is often experimental, and the social and economic formations for which we use labels like "digital economy" are in very early stages of their development. Professor Peter Lyman, agreeing with Froomkin, explains that "[t]he danger is that a legal regime intended to strengthen the digital economy could inhibit its growth and resiliency in the global economy if it does not fully understand its structures, dynamics, and needs."[121]

Barlow sees the problem as a cultural, or social, clash. In discussing the problem of policing intellectual property rights on the Internet, he explains the problem in a way that contains a warning concerning the future of online contract law:

> Humans have not inhabited cyberspace long enough or in sufficient diversity to have developed a Social Contract that conforms to the strange new conditions of that world.... To the extent that law and established social practice exists in this area, they are already in

118. *See supra* text accompanying notes 77-109.

119. Froomkin, *supra* note 69, at 1026.

120. *Id.*

121. Peter Lyman, *The Article 2B Debate and the Sociology of the Information Age*, 13 BERKELEY TECH. L.J. 1063, 1067-68 (1998).

> dangerous disagreement.... Part of the widespread disregard for commercial software copyrights stems from a legislative failure to understand the conditions into which it was inserted. To assume that systems of law based in the physical world will serve in an environment as fundamentally different as cyberspace is a folly for which everyone doing business in the future will pay.[122]

States contemplating adoption of the UCITA, or any similarly-intended legislation, must heed this warning.

Barlow's statements bring up another consideration missed by critics of the UCITA's approach to consumer protection standards: the Internet has and will continue to fundamentally change business models by rendering geography less relevant to consumer choices. Someone living in a small town in Kansas no longer needs to choose between the two programs offered at her local Radio Shack (and their corresponding license terms), but may buy software from New York, Hong Kong, or Israel, giving the license terms more weight in the purchase decision than the location of the vendor. This development will ultimately lead to a greater equality among vendors since the product, and not the convenience, will become the primary concern. As noted by Lyman, "access to information will shift market power from the producer to the consumer, and ... therefore the key to business success in the information age will be the use of virtual community technology to create customer loyalty."[123] License terms will be one consideration in a purchase decision, and purchasers will have hundreds of software options—and can vote with their dollars if terms are unacceptable. Put succinctly by Judge Easterbrook of the Seventh Circuit, "[c]ompetition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy."[124]

The last consideration, but certainly not the least, is that any new restrictive laws on online commerce will conflict with current U.S. government policy. With two general exceptions, online pornography and the exportation of cryptography, the U.S. government has used a laissez-faire approach to laws and policies controlling online commerce. Even those two exceptions are not ironclad. Congress' initial attempt to outlaw online pornography, the Communications Decency Act of 1996, was struck down as an unconstitutional limitation of free speech rights in *Reno v. American Civil Liberties*

122. Barlow, *supra* note 116, at 355-56.

123. Lyman, *supra* note 121, at 1080 (citing JOHN HAGEL III & ARTHUR ARMSTRONG, NETGAIN: EXPANDING MARKETS THROUGH VIRTUAL COMMUNITIES 187 (1997)).

124. *ProCD Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996).

Union.[125] Furthermore, the government has begun to consider easing the ban on the exportation of cryptography programs. A House subcommittee recently passed legislation to relax export controls.[126] The U.S. Commerce Department has also issued more relaxed rules.[127]

Regarding electronic commerce more generally, the government has taken a decidedly hands-off approach. The Internet Tax Freedom Act, passed in October of 1998, put a three-year moratorium on any taxation of Internet commerce.[128] The leading candidates in the U.S. Presidential Election of 2000 support at least a further temporary moratorium, and some even favor a permanent ban on Internet taxes.[129] A recently issued report from the Commerce Department also makes the point more generally. The report states that "[g]overnments must allow electronic commerce to grow up in an environment driven by markets, not burdened with extensive regulation, taxation, or censorship. While government actions will not stop the growth of electronic commerce, if they are too intrusive, progress can be substantially impeded."[130] The report mandates that "[t]he private sector and government, working together, must address these problems in ways that make the Internet a safe environment while not impeding its commercial development."[131]

V. Conclusion

The Internet plays a significant role in the newly emerging economy. Online purchases of software are particularly important to that economy and appropriate legal protections should be afforded to both licensors and licensees. However, these protections must not be in the form of laws that constrict economic growth. The commentators who worry about the lack of consumer protections

125. Reno v. ACLU, 521 U.S. 844, 885 (1997). *See also* ACLU v. Reno, 31 F. Supp. 2d 473 (E.D. Pa. 1999) (striking down Congress' second attempt, the Child Online Protection Act).

126. H.R. 850, 106th Cong. (1999).

127. *U.S. Issues Relaxed Export Limits on Encryption*, NAT'L POST, Dec. 31, 1998, at D02.

128. Internet Tax Freedom Act, Pub. L. No. 105-277, Title XI [H.R. 4328] (1998); *see also* David E. Hardesty, *Internet Tax Freedom Act*, THE TAX ADVISER, Jan. 1999, at 53.

129. *See* Carolyn Lochhead, *Candidates Bow at High Tech's Altar*, S.F. CHRON., Jan. 20, 2000, at A1.

130. *The Emerging Digital Economy* (visited Sept. 15, 2000) <http://www.ecommerce.gov/emerging.html>.

131. *Id.*

afforded by the UCITA are focusing on the wrong issue—the protections are sufficient, the new focus must be on not smothering online commerce with restrictive laws. Instead, legislators, judges, lawyers, and other practitioners would do better to look to previous case law and precedent in finding their way. Any new laws or regulations in this area must focus on the concept of a contract, not on the technical workings of its creation, or the laws will become as quickly outdated as the technology.